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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 ANTHONY WAYNE JOHNSON, Jr.,
CDCR #F-58411

12 Plaintiff,

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14 vs.

15 M. GAINS, et al.,

16
17 Defendants.

Civil No. 09cv2868 DMS (AJB)

**ORDER DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION**

[Doc. No. 6]

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19 On December 21, 2009, Plaintiff, an inmate currently incarcerated at Salinas Valley State
20 Prison located in Soledad, California and proceeding pro se, filed a civil rights Complaint
21 pursuant to 42 U.S.C. § 1983.

22 Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a) to
23 commence a civil action; instead, he filed a Motion to Proceed *In Forma Pauperis* ("IFP")
24 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. The Court sua sponte dismissed Plaintiff's
25 Complaint pursuant to 28 U.S.C. § 1915A(b)(1) because it was duplicative of *Johnson v. Gains*,
26 S.D. Cal. Civil Case No. 09cv1312 LAB (POR). Plaintiff has now filed a "Motion for
27 Reconsideration." [Doc. No. 6].

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1 I. Plaintiff's Motion for Reconsideration

2 A. Standard of Review

3 The Federal Rules of Civil Procedure do not expressly provide for motions for
 4 reconsideration.¹ However, a motion for reconsideration may be construed as a motion to alter
 5 or amend judgment under Rule 59(e) or Rule 60(b).² See *Osterneck v. Ernst & Whinney*, 489
 6 U.S. 169, 174 (1989); *In re Arrowhead Estates Development Co.*, 42 F.3d 1306, 1311 (9th Cir.
 7 1994). In *Osterneck*, the Supreme Court stated that “a postjudgment motion will be considered
 8 a Rule 59(e) motion where it involves ‘reconsideration of matters properly encompassed in a
 9 decision on the merits.’” *Id.* at 174 (quoting *White v. New Hampshire Dep’t of Employ’t Sec.*,
 10 455 U.S. 445, 451 (1982)). Under Rule 59(e), “[r]econsideration is appropriate if the district
 11 court (1) is presented with newly discovered evidence, (2) committed clear error or the initial
 12 decision was manifestly unjust, or (3) if there is an intervening change in controlling law. There
 13 may also be other, highly unusual, circumstances warranting reconsideration.” *School Dist.*
 14 *No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citations omitted).

15 B. Discussion

16 In Plaintiff's Motion for Reconsideration, he expresses confusion with respect to the
 17 Orders that have been issued in his previous case. Specifically, Plaintiff states that several
 18 claims were dismissed without prejudice in *Johnson v. Gains*, S.D. Cal. Civil Case No.
 19 09cv1312 LAB (POR). Therefore, Plaintiff decided to re-file those dismissed claims in this
 20 separate action. However, while there were claims dismissed without prejudice in his previous

21
 22 ¹ However, Local Rule 7.1(i) does permit motions for reconsideration. Under Local Rule
 23 7.1(i)(1), a party may apply for reconsideration “[w]henver any motion or any application or petition
 24 for any order or other relief has been made to any judge and has been refused in whole or in part....” S.D.
 25 CAL. CIVLR 7.1(i). The party seeking reconsideration must show “what new or different facts and
 circumstances are claimed to exist which did not exist, or were not shown, upon such prior application.”
Id. Local Rule 7.1(i)(2), however, only permits motions for re consideration within “twenty -eight (28)
 days after the entry of the ruling, order or judgment sought to be reconsidered.”

26 ² Rule 59(e) motions must be filed “no later than 10 days after the entry of the judgment.”
 27 FED.R.CIV.P. 59(e). Under Rule 60(c), however, a motion for “relief from judgment or order” may be
 28 filed within a “reasonable time,” but usually must be filed “no more than a year after the entry of
 judgment or order or the date of the proceeding.” FED.R.CIV.P. 60(c). Reconsideration may be granted
 in the case of: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence;
 or (3) fraud; or if (4) the judgment is void; (5) the judgment has been satisfied; or (6) for any other
 reason justifies relief. FED.R.CIV. P. 60(b).

1 case, Plaintiff was also permitted leave to file an amended Complaint in order to try to correct
2 the problems identified by District Judge Burns. Instead of filing a separate action, Plaintiff
3 must first attempt to amend his pleading in *Johnson v. Gains*, S.D. Cal. Civil Case No. 09cv1312
4 LAB (POR).

5 Accordingly, the Court finds that Plaintiff has provided no newly discovered evidence,
6 has failed to show clear error or that the Court rendered a manifestly unjust decision, and has
7 further failed to identify any intervening changes in controlling law that would demand
8 reconsideration of the Court's Order. *School Dist. No. 1J*, 5 F.3d at 1263.

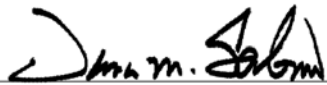
9 **II. Conclusion and Order**

10 The Court **DENIES** Plaintiff's Motion for Reconsideration [Doc. No. 6]. Moreover, the
11 Court **CERTIFIES** that an IFP appeal from this Order would also be frivolous and therefore,
12 would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United*
13 *States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent
14 appellant is permitted to proceed IFP on appeal only if appeal would not be frivolous).

15 The Clerk shall close the file.

16 **IT IS SO ORDERED.**

17 DATED: February 17, 2010

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20 HON. DANA M. SABRAW
21 United States District Judge
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